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No. ____

IN THE
Supreme Court of the United States

TUSHAR PRAVINKUMAR GOR,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

PHILIP A. EICHORN
PHILIP A. EICHORN CO., LPA
1370 W. 6th St.
Suite 202
Cleveland, OH 44113
(216) 970-4234

ELAINE J. GOLDENBERG
Counsel of Record
MATTHEW S. HELLMAN
ERIC R. HAREN
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

QUESTIONS PRESENTED

In *Kucana v. Holder*, this Court held that the Courts of Appeals had jurisdiction to review BIA reopening determinations for abuse of discretion despite the fact that the relevant regulations committed those determinations to the discretion of the Board.

1. Did the Court of Appeals err in holding that did not have jurisdiction to review a denial of *sua sponte* reopening even though the petitioner raised constitutional and legal questions that the majority of circuits have treated as reviewable?
2. Did the Court of Appeals err in holding, post-*Kucana*, that it had no jurisdiction to review *sua sponte* reopening determinations even though such determinations are governed, in relevant part, by the same statutory and regulatory framework as other reopening determinations?

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PETITION FOR A WRIT OF CERTIORARI

Tushar Pravinkumar Gor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 607 F.3d 180 and reprinted in the appendix to this petition ("Pet. App.") at 1a-42a.

JURISDICTION

The Sixth Circuit entered its judgment on June 4, 2010, and denied Mr. Gor's timely petition for rehearing or rehearing *en banc* on October 5, 2010. Pet. App. 1a, 46a-47a. On December 13, 2010, Justice Kagan granted an application to extend the time to file a petition for a writ of certiorari to February 3, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution, 5 U.S.C. § 701, 8 U.S.C. § 1252, 8 U.S.C. § 1227, 8 C.F.R. § 1003.2, 8 C.F.R. § 1240.10, and Ohio Revised Code 2919.21(B). The pertinent provisions are reproduced in the Appendix at Pet. App. 48a-53a.

STATEMENT OF THE CASE

A. Factual and Procedural Background

1. Mr. Gor is a citizen of India who "was admitted to the United States as a lawful permanent resident on February 27, 1985, when he was four years old." Pet. App. 3a. His parents are "naturalized United

States citizens." *Id.* Mr. Gor's brother resides in the United States, as do Mr. Gor's two children, who were both born in this country. Mr. Gor has "earned an associate's degree in computer electronics" at a U.S. institution. *Id.* His "ties to India are limited to three trips he made there during the 1990s for a total period of less than three months." *Id.*

In 2004 and 2006, Mr. Gor was charged and convicted of felony non-support of his children under Ohio Revised Code section 2919.21(B). *Id.* "In the first case, he was charged with 'recklessly failing to provide support as established by a court order' when he fell behind on his child support obligations, and he was sentenced to three years of community control." *Id.* When "the child support arrearage continued to accumulate," he was convicted of "three more counts of 'abandon[ing] or fail[ing] to provide support'" and was sentenced to two years' incarceration. *Id.* at 3a-4a.

Just a few weeks after this second set of convictions, the U.S. Department of Justice issued Mr. Gor a Form I-862 Notice to Appear, initiating removal proceedings for his failure to pay child support. Pet. App. 4a. The purported statutory basis for this action was 8 U.S.C. § 1227(a)(2)(E)(i), which provides that an alien is deportable if he is convicted of "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment."

Already lacking funds and now in state prison, Mr. Gor could not retain counsel despite substantial efforts. He appeared at various calendar hearings in his removal case "via a telemonitor from the Orient

Confinement Facility in Ohio." Pet. App. 4a.

During one of these hearings, the immigration judge ("IJ") "advised the petitioner that he had a right to a lawyer at his own expense, and if he could not afford a lawyer, the court would give him 'a list of organizations that might represent you at low cost or no charge but they do not have to represent you.'" *Id.* Provision of such a list, and confirmation of its receipt, is required by regulation, *see* 8 C.F.R. § 1240.10(a) – but the immigration court never actually obeyed that mandate. Pet. App. 4a ("the petitioner was *never provided with such a list*" (emphasis added)).[1] Without access to the list, Mr. Gor's strenuous efforts to secure representation were unsuccessful, since he could not afford to pay the fees of the lawyers he contacted. *Id.* at 5a (quoting Mr. Gor's statement to the IJ that he "contacted about 75 lawyers, each one I got a response from said they

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[1] The regulation states that "the immigration judge *shall*":

> (1) Advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice authorized to practice in the proceedings and require the respondent to state then and there whether he or she desires representation;
>
> (2) Advise the respondent of the availability of free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized pursuant to § 1292 2 of this chapter, located in the district where the removal hearing is being held; [and]
>
> (3) Ascertain that the respondent has received a list of such programs, and a copy of appeal rights

8 C.F R § 1240 10(a)(1)-(3); *see also* 8 C.F R § 287 3(c)

can't do it for under $2,000 which right now I don't have the capable means of, as I'm locked up").

The IJ nevertheless forced Mr. Gor to proceed without counsel. During the subsequent hearing, "the petitioner admitted all the allegations made in the Notice to Appear, and the IJ found him in violation of section 237(a)(2)(E) as having been convicted of a crime of child neglect or abandonment." *Id.* The IJ also denied Mr. Gor's *pro se* motion for cancellation of removal under section 240A of the Immigration and Nationalization Act. *Id.* The result of these proceedings was an order to remove Mr. Gor to India, a country that he barely knows.

Still proceeding *pro se*, Mr. Gor appealed to the BIA, challenging only the merits of the decision not to cancel his removal. The BIA affirmed without opinion. Mr. Gor did not file a petition for review of this decision within the applicable timeframe.

2. Gor then finally was able to retain counsel, who "moved the BIA to reopen removal proceedings *sua sponte* under 8 C.F.R. § 1003.2(a)." *Id.* at 6a. Mr. Gor then raised, for the first time, four meritorious arguments, all purely legal ones.

First, Mr. Gor argued that his state convictions of nonsupport did not qualify as removable offenses under 8 U.S.C. § 1227(a)(2)(E)(i). Mr. Gor was convicted under Ohio Revised Code § 2919.21(B), which provides that "no person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support." That statute is worded in the disjunctive, criminalizing abandonment *or* failure to provide support for one's child. Only the

"abandonment" prong is even potentially within the scope of 8 U.S.C. § 1227(a)(2)(E)(i), which covers "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment."

Second, Mr. Gor argued that the IJ erred when he did not provide Mr. Gor with a list of low-cost immigration attorneys in the area. Aliens have the statutory "privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1362. And the IJ is required to advise the respondent of his right to representation by counsel and of "the availability of free legal services provided by organizations and attorneys . . . located in the district where the removal hearing is being held." 8 C.F.R. § 1240.10(a). The IJ is also required to "[a]scertain that the respondent has received a list of such programs." *Id.* It was undisputed that the IJ in this case failed to provide Mr. Gor with the required list of free legal services organizations and attorneys, and failed to ascertain that Mr. Gor received such a list. Pet. App. 4a. Gor contended that this failure constituted a denial of due process. *See, e.g.*, *Picca v. Mukasey*, 512 F.3d 75, 78 (2d Cir. 2008) (failure of an immigration judge to follow established procedures regarding an alien's representation by counsel "constitute[s] reversible error, without a showing of prejudice, because, among other reasons, the right to counsel concerns fundamental notions of fair play underlying the concept of due process" (internal quotation marks omitted)).

Third, Mr. Gor argued that he was denied due process when the IJ proceeded with the removal hearing despite Mr. Gor's inability to retain an attorney. *See, e.g.*, *Denko v. INS*, 351 F.3d 717, 724 (6th Cir. 2003); *Fadiga v. Att'y Gen. of U.S.*, 488 F.3d 142, 153 (3d Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 793-94 (9th Cir. 2005); *Surganova v. Holder*, 612 F.3d 901, 907 (7th Cir. 2010); *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988), *superseded by In re Compean* (*Compean I*), 24 I. & N. Dec. 710 (BIA 2009), *later reinstated by In re Compean* (*Compean II*), 25 I. & N. Dec. 1 (BIA 2009)).

Fourth, Mr. Gor argued that the IJ committed another fundamental error when he failed to advise Mr. Gor of the availability of, or to consider, discretionary relief from removal, including adjustment of status and voluntary departure. The pertinent regulation provides that "[t]he immigration judge *shall inform* the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing." 8 C.F.R. § 1240.11(a)(2). This regulation applies to the discretionary relief of adjustment of status and voluntary departure. *Id.* § 1240.11(a)(1) (listing "adjustment of status"); *id.* § 1240.11(b) (listing "voluntary departure"). An IJ's failure to inform an alien of the potential availability of discretionary relief can constitute a denial of due process or otherwise require reversal. *See, e.g.*, *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) ("We believe that a failure to advise a potential deportee of a right to seek Section 212(c) relief can, if prejudicial, be

fundamentally unfair").

The BIA rejected all of these arguments and denied Mr. Gor's motion. The BIA stated that the case was "not an exceptional situation" since "[a]ll of the claims presented . . . could have been presented to the Board on appeal, and the case law [Mr.] Gor cited came from outside of the Sixth Circuit, was unpublished[,] or not directly relevant." Pet. App. 6a (internal quotation marks omitted).

3. Mr. Gor filed a timely petition for review of that decision in the Sixth Circuit. *Id.* Mr. Gor raised in the Sixth Circuit the same four arguments he raised in his motion to reopen *sua sponte*. *Id.* at 6a-7a. The government filed a motion to dismiss for lack of jurisdiction. *Id.*

In a deeply divided decision, the Sixth Circuit dismissed the petition for lack of jurisdiction. The court affirmatively accepted the *validity* of Mr. Gor's constitutional and legal challenges to his removal. Pet. App. 27a-28a ("It is doubtful, however, that the definition [in the federal statute on which Mr. Gor's removal was premised] is broad enough to include the crime of failing to pay child support, which would expand significantly the grounds for removal."); *id.* at 24a ("the IJ's failure to abide by the agency's own regulations, insofar as it impeded Gor's ability to retain counsel, likely violated Gor's right to due process"); *id.* at 25a ("but for the IJ's apparent due process violation, there is a strong possibility that Gor could have demonstrated his deportation is contrary to law"). But the court nevertheless held that Sixth Circuit precedent, which applied this Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), compelled

the conclusion that the Court lacked jurisdiction to hear Mr. Gor's petition. Pet. App. 15a-16a (citing *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008), and *Harchenko v. INS*, 379 F.3d 405, 409 (6th Cir. 2004)).

The Sixth Circuit followed its prior cases reluctantly. It expressed the view that the Court's "decision in *Kucana v. Holder*, 130 S. Ct. 827 (2010), casts considerable doubt on" the reasoning of those cases, Pet. App. 2a, and stated that they were inconsistent with *Heckler* and its progeny.

Nevertheless, because *Kucana* expressly reserved the question whether denials of motions to reopen *sua sponte* are reviewable, *Kucana v. Holder*, 130 S. Ct. 827, 839 n.18 (2010), the Sixth Circuit followed its prior decisions while "urg[ing] the *en banc* court to reexamine the validity of our prior cases in this area." Pet. App. 2a-3a; *see also id.* at 23a ("[W]e believe those precedents ought to be reexamined by the *en banc* court.").

Judge Cole concurred, further explaining that "the outcome of *Kucana* casts implicit but considerable doubt on the continued validity of" the Sixth Circuit precedent holding denials of motions to reopen *sua sponte* to be wholly unreviewable. *Id.* at 38a.

Mr. Gor filed a petition for rehearing or rehearing *en banc*, which was denied on October 5, 2010.

B. Statutory and Regulatory Background

Reopening determinations are governed by a series of statutes and regulations. As this Court recounted in *Dada*, reopening by the BIA was first regularized by regulation in 1958, although the

procedure dated at least as far back as 1916. *Dada v. Mukasey*, 554 U.S. 1, 13 (2008) (citing 23 Fed. Reg. 9115, 9118-19 (1958)). The 1958 regulation provided that "[t]he Board may on its own motion reopen or reconsider any case in which it has rendered a decision." 8 C.F.R. § 3.2 (1959).

The formal distinction between a "motion to reopen" and a "motion to reopen *sua sponte*" dates to 1990, when "Congress ordered the Attorney General to 'issue regulations with respect to . . . the period of time in which motions to reopen . . . may be offered in deportation proceedings,' including 'a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions.'" *Dada*, 554 U.S. at 13 (quoting Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(1), 104 Stat. 4978, 5066) (ellipses in original). The resulting regulation, which is set out in its current form at 8 C.F.R. § 1003.2, not only provides that the Board "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision," but also sets forth procedures for a party to file his or her own motion. 8 C.F.R. § 1003.2(a), (c). Despite the "*sua sponte*" descriptor that the former process is given, the name is somewhat misleading because the Board's power to reopen on "its own motion" may be invoked (and typically is invoked) by a motion from a party.

With respect to an ordinary motion to reopen, of the type addressed by this Court in *Kucana*, a party has the right to file a single motion within 90 days of the decision to be reopened, and the regulation sets forth various substantive prerequisites that such a

motion must satisfy in order to be considered. 8 C.F.R. § 1003.2(c)(1). Satisfaction of these criteria, however, is not necessarily sufficient to obtain reopening under § 1003.2(c), which provides that "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board," and gives the Board "discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. § 1003.2(a).

The substantive standards that apply to so-called *sua sponte* reopening are set out in the BIA's own binding precedent. The BIA employs an "exceptional circumstances" or "exceptional situation" standard in determining whether to grant such a motion. *E.g., In re Beckford*, 22 I. & N. Dec. 1216 (BIA 2000); *In re J-J-*, 21 I. & N. Dec. 976 (BIA 1997). The same regulation quoted above gives the Board discretion to grant relief in the *sua sponte* context as well. 8 C.F.R. § 1003.2(c).

Until 1996, there was no explicit statutory authorization for reopening procedures of any sort. Instead, the Attorney General had identified the general grant of rulemaking authority for immigration matters, currently set out at 8 U.S.C. § 1103(a), as the basis for the regulations. *See, e.g.*, 23 Fed. Reg. at 9117; *Kucana*, 130 S. Ct. at 840 (Alito, J., concurring in the judgment). In 1996, Congress for the first time dictated procedures for motions to reopen. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, 3009-593. The statute, now codified at 8 U.S.C. § 1229a(c)(7), "guarantees to each alien the right to

file 'one motion to reopen proceedings,'" *Dada*, 554 U.S. at 15, and "simply lays out the requirements *an alien* must fulfill when filing a motion to reopen," *Kucana*, 130 S. Ct. at 833 n.6 (quoting *Kucana v. Mukasey*, 533 F.3d at 541 (Cudahy, J., dissenting)). Those procedural requirements, however, do not touch on the Attorney General's authority to decide motions to reopen. Rather, as the Court explained in *Kucana*, the statute "is not directed to the agency's discretion to grant or deny motions to reopen." *Id.* Indeed, "[i]t is hard to see how the regulation could draw force from § 1229a(c)(7), for the regulation was already in force when that statutory provision was enacted." *Id.* at 834 n.9.

REASONS FOR GRANTING THE WRIT

There is entrenched division and confusion among the lower courts concerning judicial review in immigration cases involving motions to reopen "*sua sponte*." The Sixth Circuit held that it lacked jurisdiction to consider Mr. Gor's petition for review from the denial of his motion to reopen *sua sponte*, even though his motion asserted a violation of his due process rights and pointed out that the statute on which his removal was based was inapplicable as a matter of law. The determination that there is no jurisdiction to review such questions is consistent with the rule in the Fourth Circuit – but it puts the Sixth Circuit on the short side of a circuit split that was lopsided even before this Court's decision in *Kucana*, and has only moved further from the Sixth Circuit's approach since then. Had Mr. Gor's petition been reviewed in the majority of circuits, it would

have been heard on the merits instead of being dismissed for lack of jurisdiction.

Moreover, the Sixth Circuit's position in this case cannot be reconciled with this Court's decision in *Kucana*, or with other authorities governing the reviewability of reopening decisions – including Congress's statement that nothing in the relevant statutory chapter can be construed to bar review of constitutional and legal claims. And the result of the Sixth Circuit's refusal to grant review in this case is that Mr. Gor will be sent to a country to which he has no ties, on the basis of an offense that does not constitute a legal basis for removal, and as the result of proceedings in which the immigration authorities violated their own regulations relating to fair process and during which Mr. Gor was not represented by counsel.

The unsettled issue presented by this case is narrow and significant. This Court's review is necessary.

I. The Decision Implicated An Entrenched Conflict and Widespread Confusion Among the Lower Courts Concerning the Jurisdiction of the Courts of Appeals.

A. The Circuits Are Split About Whether There Is Jurisdiction To Review Denials Of Reopening *Sua Sponte* Based On Questions of Law.

In *Kucana*, this Court expressly left open the question of whether there was jurisdiction to review a denial of a motion to reopen *sua sponte*. In doing so, the Court observed that 11 Courts of Appeals had

determined that there was no jurisdiction in such cases because there was "no law to apply" under 5 U.S.C. § 701(a)(2). The Courts of Appeals, however, had even at that time adopted materially different approaches to review of denials of *sua sponte* reopening where, as here, questions of law are involved.

Specifically, prior to *Kucana*, only the Fourth Circuit had joined the Sixth Circuit in taking the position that review was unavailable for denials of *sua sponte* reopening even in cases – like this one – that involved constitutional or statutory questions. *Mosere v. Mukasey*, 552 F.3d 397, 400 (4th Cir. 2009) (stating categorically that there is no jurisdiction to review *sua sponte* denials of reopening).

Almost every other Court of Appeals, in contrast, has clearly held that review *is* available for constitutional and statutory questions. For example, the Second Circuit has held that it has it has jurisdiction to consider legal claims. *See Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (holding that it can "review 'all constitutional claims or questions of law' raised by the BIA's exercise of its discretion" (quoting *Argueta v. Holder*, 617 F.3d 109, 112 (2d Cir. 2010))). In explaining the boundaries of its review, the Second Circuit stated: "We ask whether the BIA is expressing legal doctrine or whether it is engaged in the factfinding and factor-balancing that are at the core of its discretion." *Rosario*, 627 F.3d at 62.

Eight other Courts of Appeals (the First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh)

have adopted this position or a close variant of it.[2] *See, e.g.*, *Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999) ("This court has jurisdiction to review Luis's due process claim." (citing *Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999))); *Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240 (3d Cir. 2006) (holding that there would be jurisdiction to review denial where underlying conviction had been vacated); *Nawaz v. Holder*, 314 F. App'x 736, 737 (5th Cir. 2009) ("'While we do not have jurisdiction to consider Nawaz's non-constitutional challenges to the BIA's refusal to reopen his removal proceedings *sua sponte*, we retain jurisdiction to consider constitutional challenges that were raised before the BIA."); *Cevilla v. Gonzales*, 446 F.3d 658, 660-61 (7th Cir. 2006) (Posner, J.) (implying that grounds involving "the application of a legal standard" are reviewable); *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc) ("Although this court lacks jurisdiction over Tamenut's challenge to the BIA's decision not to reopen *sua sponte*, we generally do have jurisdiction over any colorable constitutional claim."); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1106 (9th Cir. 2006) (jurisdiction to review where a "'key part' of the government's case [for] removal," such as the validity of a predicate criminal conviction, is challenged); *Belay-Gebru v. I.N.S.*, 327 F.3d 998 (10th Cir. 2003) (finding decisions discretionary but citing *Luis*, 196 F.3d at 40); *Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 n.7 (11th Cir. 2008) ("[A]n appellate court may have

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[2] The D.C. Circuit is the only territorial court of appeals that has not addressed this issue

jurisdiction over constitutional claims related to the BIA's decision not to exercise its *sua sponte* power.").

Notably, these Courts of Appeals have recognized that claims of the sort presented in this case are the types of constitutional and legal questions for which there is jurisdiction. For example, courts have found jurisdiction to hear appeals where, as here, the petitioner's claim concerns a denial of due process stemming from a lack of counsel. *See Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999) (holding that there was jurisdiction to hear "Bernal's claim of ineffective assistance of counsel amounting to a due process violation [because that] argument does not involve a matter that Congress committed to agency discretion."); *Mendiola v. Holder*, 585 F.3d 1303, 1309-10 (10th Cir. 2009) (jurisdiction "where the motion alleges ineffective assistance of counsel rising to the level of a due process violation"), *cert. denied*, 131 S. Ct. 502 (2010). Courts have also found jurisdiction where, as here, there is a legal question going to whether the underlying offense is a deportable one. *See Cruz*, 452 F.3d at 246-47; *Cardoso-Tlaseca*, 460 F.3d at 1104-05.

This lopsided split of authority demonstrates that the Sixth Circuit's refusal to exercise jurisdiction over legal claims is out of step with the practice of most other Courts of Appeals. This Court should grant this Petition to resolve that split.

B. The Split Has Deepened, Post-*Kucana*, To Include Circuits That Review All Questions, Including Non-Legal Ones, For Abuse of Discretion.

In the wake of *Kucana*, there has been further disagreement about the scope of review – even apart from review of purely legal questions – in light of *Kucana's* holding that only Congress and not an agency may commit review to the agency's sole discretion. As explained in more detail below, *Kucana* held that § 1252, the same grant of jurisdiction that is at issue here, could not be construed to permit the "extraordinary delegation" that would "free the Executive to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" 130 S. Ct. at 830. Accordingly, *Kucana* held that reopening determinations under 8 C.F.R. § 1003.2(a) were to be reviewed for abuse of discretion.

Given that the BIA's decision to reopen *sua sponte* is made discretionary only by regulation, and not by any statute, the Seventh Circuit has applied abuse of discretion review to such decisions, just as it does to review of non-*sua sponte* decisions to reopen after *Kucana*. *Munoz de Real v. Holder*, 595 F.3d 747, 750 (7th Cir. 2010).[3] In contrast, other circuits have held

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[3] The Seventh Circuit subsequently stated in an unpublished decision that *Munoz de Real* had merely presumed that review was for abuse of discretion, and left open the possibility that *Kucana* had not changed the reviewability of *sua sponte* reopening determinations *Kocev v. Holder*, 365 F. App'x 707, 708 (7th Cir. 2010)

that *Kucana* has not changed the terms of reviewability of *sua sponte* reopening determinations. *Neves v. Holder*, 613 F.3d 30, 33 (1st Cir. 2010); *Ruiz v. Holder*, 374 F. App'x 170, 173 (2d Cir. 2010); *Ochoa v. Holder*, 604 F.3d 546, 549 n.3 (8th Cir. 2010); *Jaimes-Aguirre v. U.S. Att'y Gen.*, 369 F. App'x 101, 103 (11th Cir. 2010).

The post-*Kucana* confusion on this score is evidenced by the Sixth Circuit's decision in this case. The lead opinion stated that the panel was bound by two prior Sixth Circuit cases holding that reopening decisions were unreviewable, but explained that "the Supreme Court's reasoning set out in *Kucana* undermines the continuing validity of [those cases], since both cases are based on the same premise rejected in *Kucana*": that an agency can "insulate its own decisions from judicial review" by regulation. Pet. App. 16a-17a; *id.* at 19a ("[T]he narrow exception to judicial review of agency decisions must originate from Congress, not the agency itself."); *id.* at 38a (Cole, J., concurring in the judgment) ("the outcome of *Kucana* casts implicit but considerable doubt on the continued validity of" Sixth Circuit precedent). The panel held that it was nonetheless constrained to follow prior circuit precedent because *Kucana* did not expressly address the question.

Only this Court can answer the question of whether *Kucana* should be read to validate the reviewability of denials of reopening *sua sponte*, as the Seventh and Sixth Circuits have suggested.

II. The Sixth Circuit Wrongly Concluded That It Lacked Jurisdiction to Review the BIA's Denial of Mr. Gor's Motion To Reopen *Sua Sponte*.

A. Under *Kucana*, Courts of Appeals Have Jurisdiction To Review *Sua Sponte* Reopening Determinations.

The Sixth Circuit's decision that it lacked jurisdiction to review the BIA's denial of Mr. Gor's motion to reopen *sua sponte* cannot be reconciled with this Court's decision in *Kucana*. Review is accordingly warranted to conform review of *sua sponte* reopening determinations to the principles announced in *Kucana*.

1. *Kucana* addressed whether the Courts of Appeals have jurisdiction to review BIA denials of reopening not falling under the BIA's *sua sponte* reopening procedures. Section 1252 of Title 8 gives the courts of appeals jurisdiction to review final orders of removal. *Nken v. Holder*, 129 S. Ct. 1749, 1755 (2009); 8 U.S.C. § 1252(a)(1), (a)(5), (b)(9), (d), (g). *Kucana* considered the interplay of that jurisdictional grant with another statutory provision that strips jurisdiction in cases involving decisions "the authority for which is specified *under this subchapter* to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The lower court in *Kucana* had found that provision to be triggered by a regulation that provided that the "decision to grant or deny a motion to reopen . . . is within the discretion of the Board." 8 C.F.R. § 1003.2(a).

This Court held that the regulation did not trigger 8 U.S.C. § 1252(a)(2)(B)(ii)'s jurisdiction-stripping

provision. Citing the long-standing presumption that Congress does not intend to strip the federal courts of jurisdiction to review "executive determinations," this Court held that the "under this subchapter" language encompassed only grants of discretion created by statute, and not those created by regulation. 130 S. Ct. at 831, 836-40. Accordingly, the discretion accorded by the reopening regulation did not provide a basis for barring judicial review. *Id.* at 840 ("Action on motions to reopen, made discretionary by the Attorney General only, therefore remain subject to judicial review.").

2. The logic of *Kucana* commands that there be appellate review of *sua sponte* reopening denials. The very same statute that provided for appellate jurisdiction over the reopening determinations at issue in *Kucana* provides for jurisdiction over *sua sponte* reopening determinations. *See* 8 U.S.C. § 1252 (providing generally for jurisdiction over orders of removal and exceptions thereto). And the very same regulation that placed the decision to reopen "within the discretion of the Board" in *Kucana* applies to *sua sponte* determinations as well. *See* 8 C.F.R. § 1003.2(a).

Given that both kinds of reopening determinations have the same statutory and regulatory pedigree, they should be equally subject to "abuse-of-discretion appellate court review." *Kucana*, 130 S. Ct. at 830, 840. Just as in *Kucana*, Congress could have expressly removed determinations made discretionary by regulation from appellate review, but it chose not to do so. *Id.* at 837 ("If Congress wanted the jurisdictional bar to encompass decisions specified as

discretionary by regulation along with those made discretionary by statute, moreover, Congress could easily have said so."); *id.* at 838 ("Had Congress elected to insulate denials of motions to reopen from judicial review, it could have so specified together with its codification of directions on filing reopening motions.").

Likewise, just as with regular reopening determinations, a *sua sponte* reopening determination is an "adjunct ruling[]" that "ordinarily . . . touches and concerns only the question whether the alien's claims have been afforded a fair hearing." *Id.* at 837. Accordingly, *sua sponte* reopening determinations, like other reopening determinations, are not of a "like kind" with the "'substantive decisions" that Congress expressly committed to executive discretion by statute. *Id.* (quoting Tr. of Oral Arg. 14).

In sum, the very same provisions that led this Court to conclude unanimously in *Kucana* that review was available for reopening determinations command the same result here.

3. To be sure, as this Court observed in *Kucana*, the Courts of Appeals have generally held that *sua sponte* reopening determinations are not subject to judicial review because there is "no law to apply" under the APA. 130 S. Ct. at 839 n.18. As this Court has explained, the "no law to apply" doctrine comes into play when a "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking

to the agency's judgment absolutely." *Id.*

But the *Heckler* exception cannot provide a basis for barring review here. It was uncontested in *Kucana* that there would be "law to apply" in reviewing reopening determination. As *Kucana* explained, reopening determinations had long been thought subject to judicial review at the time Congress enacted the jurisdiction-stripping provision set out at § 1252(a)(2)(B)(ii). 130 S. Ct. at 834 ("Federal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916."); *see also id.* ("courts have employed a deferential, abuse-of-discretion standard of review." (citing *INS v. Doherty*, 502 U.S. 314, 323 (1992))); *INS v. Abudu*, 485 U.S. 94, 105 (1988) (holding that standard of review is abuse of discretion). Accordingly, once the Court determined in *Kucana* that Congress did not intend to *remove* jurisdiction, the result was that "abuse-of-discretion appellate court review" would continue for reopening determinations, even though the BIA had "issu[ed] a regulation declaring those decisions 'discretionary.'" 130 S. Ct. at 840. In other words, consistent with past practice, appellate courts did have law to apply to such decisions, despite the fact that the agency had committed them to its sole discretion.

Sua sponte determinations are no different. There is not "less" law to apply to *sua sponte* determinations relative to other reopening determinations. As explained above, both are committed to the agency's discretion by regulation, and both are reviewable under the same statutory provision. Put another way, if Gor had raised his claims in an ordinary

reopening petition, the BIA still would have had the discretion to deny reopening, even if Gor had made out a "prima facie case" for relief. *Kucana*, 130 S. Ct. at 835. Under *Kucana*, that determination would have been reviewable for abuse of discretion. The fact that Gor's reopening petition was filed under *sua sponte* procedures does not make the BIA's review any more discretionary, or provide any less law to apply. Pet. App. 36a (Cole, J., concurring in the judgment) ("the Court's rationale [in *Kucana*] nonetheless suggests that neither § 1252(a)(2)(B)(ii) nor any dearth of meaningful standards of review precludes our consideration of such decisions."). In this case, the BIA held that reopening was inappropriate because Gor had failed to make his arguments to the BIA (when he had no lawyer), and because it found unpersuasive the legal authority that Gor cited for his position. Those determinations are fully susceptible to abuse of discretion review even though they arise in the *sua sponte* context.

Nor does it make a difference that Congress as part of IIRIRA codified certain procedures for reopening determinations, including the right to file one timely motion to reopen. *See* 8 U.S.C. § 1229a(c)(7). The fact that Section 1229a(c)(7) mandates that the BIA provide procedures to timely reopen removal determinations is analytically distinct from whether there is sufficient law to apply to review those determinations. While no statute mandates the *sua sponte* reopening procedures, the quantum of law that governs the substance of the procedures is the same. And while the BIA might be able to rescind its *sua sponte* reopening regulations, so long as it

continues to use them, there is law to apply that can provide the basis of abuse of discretion review in the appellate courts, just as there was in *Kucana*.

In the context of the kinds of legal questions raised by Mr. Gor's petition to reopen, it is particularly clear that there is sufficient law to apply. As with the ordinary motions to reopen held reviewable by the Court in *Kucana*, the BIA's decision to reopen *sua sponte* is discretionary, and there is a clear legal standard that the BIA employs. When the BIA decides whether to grant a motion to reopen *sua sponte*, it uses an "exceptional circumstances" or "exceptional situation" standard. *See supra* p. 10. The exceptional circumstances test provides ample law to allow for judicial review. Indeed, in applying these standards the BIA frequently grants motions to reopen *sua sponte* that raise a meritorious challenge to the underlying ground for removal – as did Mr. Gor's motion in this case. *See, e.g.*, *Cruz*, 452 F.3d at 246 n.3 (permitting review of denial of *sua sponte* motion and noting ten such BIA decisions); *In re Agasino*, No. A092 177 125-SAN, 2010 WL 2224557 (BIA May 7, 2010) (granting motion that was filed ten years too late, finding that alien's "conviction for theft is not an aggravated felony," and concluding "that the respondent is no longer removable as charged"); *In re Bworna*, No. A29 575 576-LARE, 2007 WL 1520877 (BIA May 14, 2007) (granting motion when court of appeals in other case concluded that petition's offense was not a "crime of violence"); *In re Sorokin*, No. A45 195 530-SAN, 2007 WL 1520791 (BIA May 11, 2007) ("Since the reason for finding that the respondent was removable apparently no longer exists, the

respondent has demonstrated exceptional circumstances justifying *sua sponte* reopening."); *In re Meola*, No. A30 951771-BOST, 2004 WL 1167123 (BIA Feb. 12, 2004) (granting motion and finding that two predicate convictions had been vacated and third did not constitute an aggravated felony).

In sum, after *Kucana*, there is no basis to immunize *sua sponte* reopening determinations from judicial review. Just as with other reopening petitions, the Court of Appeals should have found that it had jurisdiction to hear Mr. Gor's petition.

B. Even If *Sua Sponte* Determinations Are Not Subject to Abuse of Discretion Review Under *Kucana*, Review Is Still Available For Legal Claims Like Those Here.

Even if *Kucana*'s reasoning does not require abuse-of-discretion review of all *sua sponte* reopening determinations, review nevertheless is available of the constitutional and legal questions raised by Mr. Gor.

1. The plain text and structure of the relevant immigration statutes makes clear that Courts of Appeals have jurisdiction to review constitutional and legal questions, and that such questions cannot fall within the "no law to apply" doctrine. Under the *Heckler* line of cases, the relevant question is whether the *statute* allowing for judicial review of an agency decision provides discernible standards for that review. *Webster v. Doe*, 486 U.S. 592, 600 (1988) (noting that *Heckler* requires a "careful examination of the *statute* on which the claim of agency illegality is based" (emphasis added)); *Heckler*, 470 U.S. at 830 ("In such a case, *the statute ("law")* can be taken to

have 'committed' the decisionmaking to the agency's judgment absolutely." (emphasis added)). Accordingly, the question under *Heckler* would be whether 8 U.S.C. § 1252, the statute providing for review of removal orders, or 8 U.S.C. § 1103, the statute pursuant to which the reopening regulation was promulgated, should be construed as having "committed the decisionmaking to the agency's judgment absolutely." 470 U.S. at 830.

Congress, however, provided that these provisions (along with all other provisions of chapter 12 of Title 8) must be construed as not "precluding review of constitutional claims or questions of law." *Id.* § 1252(a)(2)(D). Specifically, Congress provided that:

> *Nothing in subparagraph (B) or (C), or in any other provision of this chapter* (other than this section) which limits or eliminates judicial review, *shall be construed as precluding review of constitutional claims or questions of law* raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Id. § 1252(a)(2)(D) (emphasis added).

Congress adopted this provision in 2005 to implement this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001); *see* REAL ID Act of 2005, Pub. L. No. 109-13, § 106, Div. B, 119 Stat. 302, and it plainly bars construing anything in chapter 12 to limit judicial review of constitutional claims and questions of law. *See generally* H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.), *reprinted in*, 2005 U.S.C.C.A.N. 240, 300 ("[t]he purpose of [§1252(a)(2)(D)] is to

permit judicial review over . . . constitutional and statutory construction questions."); *id.* at 174, 2005 U.S.C.C.A.N. at 299 ("all aliens who are ordered removed by an immigration judge will be able to appeal to the BIA and then raise constitutional and legal challenges in the courts of appeals.").

Section 1252(a)(2)(D)'s express preservation of review of constitutional and legal questions in the immigration context in effect supersedes the background APA principles that might otherwise apply. *Cevilla*, 446 F.3d at 660-61 (Posner, J.) ("[T]he general 'no law to apply' principle of judicial review of administrative action *has been superseded in the immigration context.*" (emphasis added)). Accordingly, even if abuse of discretion review is not generally available, the Court of Appeals had jurisdiction to review the constitutional and legal questions raised by Mr. Gor.

2. Moreover, even if *Heckler* were to apply, review is available here. In *Webster*, this Court held that Congress must speak clearly before the Court will conclude that a statute strips the judiciary of power to review colorable constitutional claims. *Webster*, 486 U.S. at 603 (citing *Johnson v. Robison*, 415 U.S. 361 (1974)). Such a clear statement plainly cannot be found in any statute at issue in this case.

Moreover, as noted above, even when Congress commits an issue to agency discretion, the agency's own regulations and prior decisions can provide the "law to apply." *See, e.g.*, *Ngure v. Ashcroft*, 367 F.3d 975, 982-83 (8th Cir. 2004) (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970)); *Padula v. Webster*, 822 F.2d 97, 100 (D.C.

Cir. 1987); *Center for Auto Safety v. Dole*, 846 F.2d 1532 (D.C. Cir. 1988). Here, the BIA has well-developed case law speaking to when reopening is warranted, and the BIA frequently grants relief in cases like Mr. Gor's. *See supra* pp. 10, 23-24. Those decisions likewise amount to law to apply under *Heckler*.

3. Mr. Gor's petition for review unquestionably raises legal claims that are reviewable. In particular, and as explained above, *see supra* pp. 4-7, Mr. Gor raised four such claims in his motion to reopen *sua sponte* and before the Sixth Circuit.

First, Mr. Gor argued that his state convictions of nonsupport did not qualify as removable offenses under 8 U.S.C. § 1227(a)(2)(E)(i). That statute provides that an alien is deportable if he is convicted of "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." Mr. Gor was convicted under Ohio Revised Code § 2919.21(B), which provides that "no person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support."

Courts generally use "a categorical approach when interpreting a state criminal statute" for immigration purposes, looking "at the 'elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime.'" Pet. App. 25a (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 6-7 (2004)). However, "[w]hen a criminal statute encompasses diverse classes of criminal acts – some of which would categorically be grounds for removal and others of

which would not – . . . [the] statute [ ] can be considered 'divisible.'" *James v. Mukasey*, 522 F.3d 250, 254 (2d Cir. 2008) (internal quotation marks omitted; first bracket added). Under this so-called "modified categorical approach," a court may "refer[ ] to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal." *Id.* (quoting *Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2d Cir. 2003) (Sotomayor, J.)); *see also In re Torres-Varela*, 23 I. & N. Dec. 78, 89 (BIA 2001) (discussing same approaches).

Under these interpretive rules, it is clear that Mr. Gor's convictions for failing to pay child support are not removable offenses. The Ohio statute is worded in the disjunctive, criminalizing failing to provide support *or* abandoning one's child. Only the "abandonment" prong is even potentially within the scope of 8 U.S.C. § 1227(a)(2)(E)(i). Failing to pay support plainly is not – as the Sixth Circuit agreed. Pet. App. 27a-28a ("It is doubtful, however, that the definition is broad enough to include the crime of failing to pay child support, which would expand significantly the grounds for removal."); *cf. Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).[4]

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[4] Indeed, Congress has clearly distinguished between crimes like "child abuse" and "child neglect" on the one hand, and failure to pay child support on the other. *Compare* 18 U.S.C. § 1169 (defining "abuse" in terms of evidence of physical or sexual harm), *and* 25 U.S.C. § 3202 (defining "child neglect" as "negligent treatment or maltreatment of a child . . . under circumstances which indicate that the child's health or welfare is harmed or threatened thereby"), *with* 18 U.S.C. § 228

Second, Mr. Gor argued that he was denied due process when the IJ proceeded with the removal hearing despite Mr. Gor's inability to retain an attorney. Several courts of appeals and the BIA have held that the ineffective assistance of counsel in removal proceedings can constitute a due process violation. *See, e.g., Denko*, 351 F.3d at 724; *Fadiga*, 488 F.3d at 153 ("claims of ineffective assistance of counsel in immigration proceedings are grounded in the 'Fifth Amendment right to due process.'"); *Mohammed*, 400 F.3d at 793; *Surganova*, 612 F.3d at 907 ("[W]e have recognized that the denial of effective assistance of counsel may under certain circumstances violate the due process guarantee of the Fifth Amendment."); *In re Lozada*, 19 I. & N. Dec. 637. A *total absence* of counsel resulting *directly* from an IJ's violation of an alien's rights, including the failure to follow applicable regulations concerning the provision of counsel (*see infra*), must therefore also be a denial of due process – particularly when the alien's offense is not a removable offense, as an attorney would be able to recognize. *See* Pet. App. 24a ("the IJ's failure to abide by the agency's own regulations, insofar as it impeded Gor's ability to retain counsel, likely violated Gor's right to due process."); *Snajder v. INS*, 29 F.3d 1203, 1206-07 (7th Cir. 1994) (vacating removal order where IJ violated petitioner's right to counsel by failing to obey BIA regulation requiring re-apprisal of the petitioner's rights following lodging of an additional charge). *Cf. Mohammed*, 400 F.3d at 793 (recognizing that a due process violation occurs

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(criminalizing willful failure to pay support in certain clearly defined situations).

when "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case" (quoting *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004))).

Third, Mr. Gor argued the IJ erred when – contrary to clear regulatory requirements – he did not provide Mr. Gor with a list of free immigration attorneys in the area, or establish that Mr. Gor was in possession of such a list. The IJ is required to advise the respondent of his right to representation by counsel and of "the availability of free legal services provided by organizations and attorneys . . . located in the district where the removal hearing is being held." 8 C.F.R. § 1240.10(a)(2); *see also generally* 8 U.S.C. § 1362. The IJ is also required to "[a]scertain that the respondent has received a list of such programs." 8 C.F.R. § 1240.10(a)(3). It is undisputed that the IJ in this case failed to provide Mr. Gor with the required list or to ascertain that Mr. Gor received it. Pet. App. 4a ("the petitioner was never provided with such a list," despite the IJ's promise to provide one).

Precedent from several courts of appeals establishes that such errors undermine the fundamental fairness of the removal proceeding and warrant appellate relief. *See, e.g.*, *Picca*, 512 F.3d at 78 ("The failure of an immigration judge to follow established procedures regarding an alien's representation by counsel and constitute reversible error, without a showing of prejudice, because, among other reasons, the right to counsel concerns fundamental notions of fair play underlying the concept of due process" (internal quotation marks omitted)); *Rotinsulu v. Mukasey*, 515 F.3d 68, 72 (1st

Cir. 2008) ("The failure to follow an applicable regulation may be a sufficient ground for vacation of an agency's decision, resulting in a remand." (citing *Picca*, 512 F.3d at 79-80)); *Leslie v. Att'y Gen. of the U.S.*, 611 F.3d 171, 180 (3d Cir. 2010) ("[W]hen an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party."); Pet. App. 25a (Sixth Circuit's statement that "but for the IJ's apparent due process violation, there is a strong possibility that Gor could have demonstrated his deportation is contrary to law.").

Fourth, Mr. Gor argued that the IJ erred when he failed to advise Mr. Gor of the availability of, or to consider, discretionary relief from removal, including adjustment of status and voluntary departure. The pertinent regulation provides that "[t]he immigration judge *shall inform* the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of § 1240.8(d)." 8 C.F.R. § 1240.11(a)(2). This regulation unquestionably applies to the discretionary relief of adjustment of status and voluntary departure. *Id.* § 1240.11(a)(1), (b). And violation of this regulation can constitute a denial of due process or otherwise require reversal. *See, e.g.*, *Copeland*, 376 F.3d at 71; *Vahora v. Holder*, 626 F.3d 907, 920 (7th Cir. 2010)

("We have considered an IJ's failure to fulfill th[e] duty [to inform an alien of apparent eligibility for adjustment of status] imposed by regulation under a due process analysis."); *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 (9th Cir. 2004) (due process violated where IJ failed to inform alien of eligibility for voluntary departure); *Moran-Enriquez v. INS*, 884 F.2d 420, 422 (9th Cir. 1989) ("[I]f an IJ fails to advise an alien of an avenue of relief potentially available to him, we will remand for consideration of the alien's eligibility for that relief.").

Mr. Gor thus alleged constitutional, statutory, and legal claims that most courts of appeals would have exercised jurisdiction to review, although the Sixth Circuit did not.[5]

III. The Question Presented Implicates a Critical Mechanism for Aliens to Have Fundamental Legal Issues Resolved By Article III Courts.

The issue presented by this case is one with critically important consequences – not only for Mr. Gor himself, but also more generally for aliens seeking a forum to advance valid legal arguments

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[5] *See, e.g., Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 327-29 (2d Cir. 2006) (construing 8 U.S.C. § 1252(a)(2)(D) to encompass review of constitutional, statutory, and regulatory questions); *Kawashima v. Holder*, 615 F.3d 1043, 1057 n.8 (9th Cir. 2010) ("Whether the BIA applied the appropriate regulation is decidedly a 'question of law' over which we retain jurisdiction."); *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (similar); *Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("we have jurisdiction to review the BIA's application of law to the facts of this case"); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (same); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55 (8th Cir. 2008) (same).

that they are not removable. "[D]eportation is a drastic measure and at times the equivalent of banishment or exile." *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) (internal quotation marks omitted). Indeed, removal "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Given the severity of removal, this Court has emphasized that motions to reopen are an "important safeguard" designed to "ensure a proper and lawful disposition" of an alien's case. *Dada*, 554 U.S. at 3.

Mr. Gor has resided legally in the United States since the age of five. The removal proceedings brought against him violated the law – indeed, the very basis for his removal is invalid, and that flaw went undetected because he was denied access to counsel. The government should not be able to ensure that these fundamental problems go unaddressed simply by writing the reopening regulation to grant itself broad discretion. Rather, Mr. Gor should be permitted judicial review of the legal questions that he has asserted. As the court below said, Mr. Gor's case "is a textbook example of the propriety – and the necessity – of judicial review of agency decisions." Pet. App. 28a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP A. EICHORN
PHILIP A. EICHORN CO., LPA
1370 W. 6th St.
Suite 202
Cleveland, OH 44113
(216) 970-4234

ELAINE J. GOLDENBERG
Counsel of Record
MATTHEW S. HELLMAN
ERIC R. HAREN
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
(202) 639-6000
egoldenberg@jenner.com

APPENDIX

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Appendix A

United States Court of Appeals,
Sixth Circuit.

Tushar Pravinkumar GOR, Petitioner,
v.
Eric H. HOLDER, Jr., Attorney General, Respondent.

No. 08-3859.
Argued: April 22, 2009.
Decided and Filed: June 4, 2010.*

Rehearing and Rehearing En Banc Denied Oct. 5, 2010.

Before: BATCHELDER, Chief Judge; COLE, Circuit Judge; LAWSON, District Judge.

LAWSON, D.J., delivered the opinion of the court. BATCHELDER, C.J. (pp. 193-96), delivered a separate concurring opinion. COLE, J. (pp. 196-99), delivered a separate opinion, concurring in part and concurring in the judgment.

OPINION

DAVID M. LAWSON, District Judge.

Petitioner Tushar Gor, a citizen of India, seeks review of a removal order entered on the ground that Gor is an "alien ... convicted of a crime of domestic

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* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment." 8 U.S.C. § 1227(a)(2)(E)(i). Gor was convicted under section 2919.21(B) of the Ohio Revised Code, which prohibits "abandon[ment], or fail[ure] to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support." Ohio Rev.Code Ann. § 2919.21(B). Although he raises four issues in his petition, the main thrust of Gor's argument is that his crimes amounted to non-support, not child abandonment, and therefore he has not committed an offense that subjects him to removal. Gor did not raise any of his four issues initially before the Immigration Judge or the Board of Immigration Appeals, nor did he file a timely petition for review of the final order of removal. He did raise these issues in a motion before the BIA to reopen the proceedings *sua sponte,* which motion was denied, and Gor has petitioned for review of that decision as well. The government has filed a motion to dismiss claiming that we have no jurisdiction to review the original decision of the BIA because of Gor's untimely petition, and we likewise have no jurisdiction to review the denial of the motion to reopen because that decision is committed to the BIA's discretion. We agree that we have no jurisdiction to review the original BIA decision. We also must conclude that we have no jurisdiction to review the denial of the motion to reopen *sua sponte,* although the Supreme Court's recent decision in *Kucana v. Holder,* --- U.S. ----, 130 S. Ct. 827, --- L. Ed. 2d ---- (2010), casts considerable doubt on our circuit precedent that dictates that result. Therefore, we will

grant the government's motion to dismiss, and urge the *en banc* court to reexamine the validity of our prior cases in this area.

I.

The petitioner, a twenty-nine-year-old citizen of India, was admitted to the United States as a lawful permanent resident on February 27, 1985, when he was four years old. Both of his parents are naturalized United States citizens who retired to live in India in January 2005. The petitioner's brother resides in the United States, and the petitioner's own ties to India are limited to three trips he made there during the 1990s for a total period of less than three months. The petitioner earned an associate's degree in computer electronics, but upon graduation worked at various manual-labor jobs outside of the computer electronics field. The petitioner's connections to the United States grew stronger when, at the age of seventeen, he fathered twin sons out of wedlock. It is his failure to provide financial support for his sons that causes his current immigration difficulties.

Gor was charged and convicted of four counts of felony non-support under Ohio Revised Code section 2919.21(B) on September 22, 2004, and three more counts of the same charge on May 26, 2006. In the first case, he was charged with "recklessly failing to provide support as established by a court order" when he fell behind on his child support obligations, and he was sentenced to three years of community control. However, Gor apparently failed to report to his probation officer, and when the child support arrearage

continued to accumulate, he was charged with three more counts of "abandon[ing] or fail[ing] to provide support" and was convicted on May 26, 2006. This time, he was sentenced to a twenty-four-month custody term (eight months on each of the counts).

Shortly after the 2006 sentencing, on June 16, 2006, the U.S. Department of Justice issued the petitioner Form I-862, Notice to Appear, which formally placed him in removal proceedings. Master calendar hearings were held in the petitioner's case on October 18, 2006, November 15, 2006, and February 20, 2007, and the petitioner appeared for all of those hearings via a telemonitor from the Orient Confinement Facility in Ohio. During the October 18, 2006 hearing, the immigration judge advised the petitioner that he had a right to a lawyer at his own expense, and if he could not afford a lawyer, the court would give him "a list of organizations that might represent you at low cost or no charge but they do not have to represent you." App'x at 27. Although the petitioner was never provided with such a list, his hearing was adjourned until November 15, 2006 to allow him the opportunity to retain counsel. The master calendar hearing was adjourned for the second time on November 15, 2006 when the petitioner still had not found a lawyer. At that point, the IJ advised Gor that if he did not retain a lawyer by the next hearing set for February 20, 2007, "we'll have to proceed without a lawyer." Suppl. App'x at 68-69. On February 20, the petitioner, still incarcerated, appeared without counsel again. The following exchange took place during the hearing:

> Q. Sir, we had a prior proceeding in this case and I've advised you of your rights to a lawyer. Do you have a lawyer, sir?
>
> A. Not at this time, Sir, I contacted about 75 lawyers, each one I got a response from said they can't do it for under $2,000 which right now I don't have the capable means of, as I'm locked up.
>
> Q. Okay, sir, well, I'm going to proceed with your case. I stated before, U.S. Government doesn't provide you with a lawyer and if a charitable organization's not going to represent you, then you're going to have to proceed without a lawyer.... Do you understand?
>
> A. Yes, Sir.

App'x at 30-31. During the hearing, the petitioner admitted all the allegations made in the Notice to Appear, and the IJ found him in violation of section 237(a)(2)(E) as having been convicted of a crime of child neglect or abandonment. Since the petitioner indicated a desire to file for asylum, the judge set the case for an individual hearing.

At the final individual hearing on April 10, 2007, Gor, again appearing *pro se,* moved for cancellation of removal under section 240A of the Immigration and Nationalization Act. The IJ denied Gor's request.

On May 10, 2007, the petitioner appealed to the BIA, still proceeding *pro se,* challenging only the merits of the cancellation-of-removal determination. On October 5, 2007, the BIA affirmed the Immigration Judge's decision without opinion. Gor did not file a petition for review of this decision within ninety days.

On May 20, 2008, Gor had retained counsel, who moved the BIA to reopen removal proceedings *sua sponte* under 8 C.F.R. § 1003.2(a). For the first time, the petitioner raised the following four arguments: (1) his Ohio state convictions of nonsupport are not removable offenses under 8 U.S.C. § 1227(a)(2)(E)(i); (2) the IJ erred when he did not provide the petitioner with a list of low-cost immigration attorneys in the area; (3) the petitioner was denied due process when the IJ proceeded with the removal hearing despite the petitioner's inability to retain an attorney; and (4) the IJ erred when he failed to advise the petitioner of the availability of and consider discretionary relief from removal available to the petitioner. The BIA denied the motion on June 11, 2008, finding that the case was "not an exceptional situation" since "[a]ll of the claims presented by the respondent ... could have been presented to the Board on appeal," and the case law Gor cited came from "outside of the Sixth Circuit," was "unpublished[,] or not directly relevant." App'x at 9.

The petitioner filed a timely petition for review of this decision, raising the four arguments presented to the BIA in his petition to reopen. As noted earlier, the government filed a motion to dismiss for lack of ju-

risdiction.

II.

Before we may consider the merits of the petitioner's claims, we must address the question of jurisdiction. The government had moved to dismiss the petition, arguing that the underlying removal order is beyond our jurisdiction because the petitioner did not file a petition to review that order within ninety days after it was issued, as required by 8 U.S.C. § 1252(b)(1) (which now requires a review petition to be filed "not later than 30 days after the date of the final order of removal"); the petitioner's arguments on appeal are not exhausted because the petitioner never properly presented them to the BIA for consideration; and this court lacks jurisdiction to review the BIA's decision not to reopen the proceedings *sua sponte* because that decision was based on the agency's exercise of discretion and Congress has stripped courts of "jurisdiction to review ... any ... decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii). The petitioner responds that his claims are based on the Constitution and raise questions of law, and Congress has provided that the jurisdiction-stripping statutes are not to "be construed as precluding review of constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(D).

A. Order of Removal

The BIA affirmed the IJ's final order of removal on

October 5, 2007. Generally, once an alien is found to be removable in a final agency order, he can file one motion to reconsider and one motion to reopen the removal proceedings with the agency, *see* 8 U.S.C. § 1229a(c)(6)-(7), or he can proceed directly to a court of appeals. 8 U.S.C. § 1252(b)(2). The time limits for filing a motion for reconsideration and a motion to reopen are "crystal clear." *Randhawa v. Gonzales,* 474 F.3d 918, 920 (6th Cir. 2007). A motion to reconsider must be filed with the agency "within 30 days of the date of entry of a final administrative order of removal," 8 U.S.C. § 1229a(c)(6)(B), and a motion to reopen must be filed "within 90 days of the date of entry of a final administrative order of removal," 8 U.S.C. § 1229a(c)(7)(C)(i). The petitioner did not meet either of these deadlines. The BIA may equitably toll the ninety-day filing deadline for filing a motion to reopen where, for example, a petitioner has received ineffective assistance of counsel. *Barry v. Mukasey,* 524 F.3d 721, 724 (6th Cir. 2008) (citing *Ljucovic v. Gonzales,* 144 Fed. Appx. 500, 503 (6th Cir. 2005)). However, the petitioner in this case has not raised an ineffective assistance of counsel argument (he was proceeding up to the point of the final agency ruling without counsel) or suggested other grounds for equitable tolling.

Besides equitable tolling, the regulations set forth four other exceptions to the timely filing of a motion to reopen with the agency: deadlines are relaxed for "motions to reopen (1) filed by aliens who are deported *in absentia*; (2) filed by aliens seeking asylum or withholding of deportation based on changed

country circumstances; (3) jointly filed by the alien and the INS; and (4) filed by the INS where the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum." *Harchenko v. INS*, 379 F.3d 405, 409 (6th Cir. 2004) (citing 8 C.F.R. §§ 1003.2(c)(3)(i)-(iv)). None of those exceptions applies here.

The alien's third option following a final removal order is appealing directly to a court of appeals. A separate deadline of thirty days exists for appealing an order of removal to an appropriate court of appeals. 8 U.S.C. § 1252(b)(1)-(2). This time limitation is enforced strictly, and courts lack jurisdiction to review a BIA decision when a petitioner fails to seek judicial review of an order within the applicable time period. *See Prekaj v. INS*, 384 F.3d 265, 268 (6th Cir. 2002).

After a final order of removal is entered by the BIA, pursuing further review within the agency does not toll the time period for seeking judicial review in the court of appeals under 8 U.S.C. § 1252(b)(1) or divest an agency decision of its finality. *Stone v. INS*, 514 U.S. 386, 405-06, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995); *see Mu Ju Li v. Mukasey*, 515 F.3d 575, 578 (6th Cir. 2008). To the contrary, "[the removal] order being final when issued, an alien has 90 days [now 30 days, *see* 8 U.S.C. § 1252(b)(1)] from that date to seek [judicial] review. The alien, if he chooses, may also seek agency reconsideration of the order and seek review of the disposition upon reconsideration within 90 days of its issuance. Where the original pe-

tition is still before the court, the court shall consolidate the two petitions." *Stone,* 514 U.S. at 405-06, 115 S. Ct. 1537. The obverse of that rule is also true: a petition for appellate-court review does not toll the time for filing a motion for reconsideration with the agency. *Randhawa,* 474 F.3d at 921. Therefore, an alien must observe separate time limitations for proceedings within the agency and within the judicial system, even if it results in several petitions for review ultimately pending before the court of appeals.

Once the BIA affirmed the final order of removal in this case, Gor had several options. First, he could have moved to reopen the removal proceedings within ninety days of October 5, 2007. Second, he could have moved for reconsideration within thirty days of the order. Third, he could have petitioned this court directly, provided he did that within thirty days of October 5. The petitioner took none of these steps within the time allowed-most likely because he was still unrepresented and incarcerated. Instead, he waited for 228 days until May 20, 2008 to file a motion for the agency to reopen its proceedings *sua sponte.* Because the petition for review of the final order of removal was untimely, the government is correct that we have no jurisdiction to address it, and that aspect of its motion to dismiss must be granted.

B. Exhaustion

According to 8 U.S.C. § 1252(d)(1), the circuit court has no jurisdiction to review a petition challenging a final order of removal unless "the alien has exhausted all administrative remedies available to the alien as

of right." *See Hassan v. Gonzales*, 403 F.3d 429, 432 (6th Cir. 2005) (citing *Perkovic v. INS*, 33 F.3d 615, 619 (6th Cir. 1994)) (describing exhaustion as a jurisdictional issue). Section 1252(d)(1)'s exhaustion requirement serves to ensure that the agency has had a full opportunity to consider a petitioner's claims, to avoid premature interference with agency's processes, and to allow the BIA to compile a record for judicial review. *Ramani v. Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004). Therefore, each of the petitioner's claims must have been presented to the BIA before the petitioner may seek review in the court of appeals. *Ibid.* (citing *Perkovic*, 33 F.3d at 619).

Notably, however, "[t]he streamlined-affirmance-without-opinion procedure is *not* a dismissal, but instead a review of the merits of an appeal." *Hassan*, 403 F.3d at 432 (citing *Denko v. INS*, 351 F.3d 717, 729 (6th Cir. 2003)). Likewise, presenting an issue in a motion to reopen *sua sponte* is sufficient to exhaust that issue. *See Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 336 (5th Cir. 2008) (holding that "if the BIA has never been given the opportunity to consider an issue but has the mechanisms to remedy it, even where the 90-day period for presenting a motion to reopen has passed, a petitioner must first present the issue to the Board in the form of a motion to reopen for exceptional circumstances."); *Padilla v. Gonzales*, 470 F.3d 1209, 1213-14 (7th Cir. 2006) (holding that a claim could be exhausted if it were denied by the agency on a motion to reopen *sua sponte*); *cf. Qeraxhiu v. Gonzales*, 206 Fed. Appx. 476, 482 (6th Cir. 2006) (stating that because

the appellant "did not raise his claims of ineffective assistance of counsel or request exercise of the BIA's *sua sponte* authority to reopen under 8 C.F.R. § 1003.2(a), the issues are not exhausted and are not properly before this court on review.").

The petitioner in this case presented each of the four issues raised in this court to the BIA in his tardy motion to reopen the proceedings. As discussed below, it is not clear that the BIA considered the merits of those issues. However, the petitioner's presentation satisfied the requirements of 8 U.S.C. § 1252(d)(1).

C. Motion to Reopen *Sua Sponte*

The government argues that we have no jurisdiction to review the BIA's denial of the untimely motion to reopen because of 8 U.S.C. § 1252(a)(2)(B), which states:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-
>
> ...
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland

> Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security....

8 U.S.C. § 1252(a)(2)(B)(ii). The government correctly notes that BIA has discretion to reopen its proceedings on its own "at any time." 8 C.F.R. § 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."). Since the agency's regulations characterize the decision as discretionary, the government reasons, section 1252(a)(2)(B) bars review. The government also points out that our precedent indicates that decisions committed to agency discretion by regulation are beyond judicial review. *See Barry*, 524 F.3d at 724; *Harchenko*, 379 F.3d at 410-11.

In *Kucana v. Holder*, --- U.S. ----, 130 S. Ct. 827, --- L. Ed. 2d ---- (2010), the Supreme Court rejected the idea that an agency can curtail the jurisdiction of an Article III court and held that "[a]ction on motions to reopen, made discretionary by the Attorney General only, ... remain subject to judicial review," *id.* at 840. In *Kucana*, the Court construed the jurisdiction-stripping provision in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, relied upon by the government here. That provision is found in 8 U.S.C. § 1252(a)(2)(B)(ii), quoted above. The Seventh Circuit found this statute to bar review of a decision by the BIA denying the petitioner's late motion to reopen

removal proceedings because the Attorney General had made such decisions discretionary by regulation. The Court noted that Congress had not codified the provision in the regulation making such decisions discretionary. The Court read the phrase "specified under this subchapter" in section 1252(a)(2)(B)(ii) to mean that "Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana*, 130 S. Ct. at 836-37.

The Court concluded that Congress intended judicial review of motions to reopen to be as broad as it was before the IIRIRA was enacted: "The BIA has broad discretion, conferred by the Attorney General, 'to grant or deny a motion to reopen,' 8 C.F.R. § 1003.2(a), but courts retain jurisdiction to review, with due respect, the Board's decision." *Kucana*, 130 S. Ct. at 838. The Court found the idea of an agency regulation placing a matter beyond court jurisdiction to contravene the "presumption ... 'that executive determinations are generally subject to judicial review,'" *id.* at 839 (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995)), "the longstanding exercise of judicial review of administrative rulings on reopening motions," *id.* at 831, and the "congressional design" that "[Congress], and only [Congress], would limit the federal courts' jurisdiction," *id.* at 839-40.

The Court's holding in *Kucana* was clear: "While Congress pared back judicial review in IIRIRA, it did not delegate to the Executive authority to do so." *Id.*

at 840. Were it otherwise, "the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" *Ibid.*

We therefore reject the government's argument that review of the denial of the petitioner's motion to reopen is barred by the confluence of 8 U.S.C. § 1252(a)(2)(B)(ii) and 8 C.F.R. § 1003.2(4).

The government also cites our precedents *Harchenko v. INS* and *Barry v. Mukasey* as an additional ground for finding a lack of jurisdiction to review the denial of the motion to reopen. In *Harchenko*, a panel of this court was asked to overturn the BIA's refusal to reopen a matter *sua sponte*. The court observed that the decision whether to reopen was within the BIA's discretion, and looking to the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985), held that the court had no jurisdiction to review the administrative decision. The panel stated: "The decision whether to invoke *sua sponte* authority is committed to the unfettered discretion of the BIA.... 'Therefore, the very nature of the claim renders it not subject to judicial review.' " *Harchenko*, 379 F.3d at 410-11 (quoting *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999) (reasoning that where there is no meaningful standard against which to judge the agency's exercise of discretion, *Heckler v. Chaney*, 470 U.S. at 830, 105 S. Ct. 1649, bars judicial review)). Following *Harchenko*, the court in *Barry* held that the court of appeals has no juris-

diction to review the denial of a motion to reopen *sua sponte*. *See Barry*, 524 F.3d at 724 (stating that where the BIA declines to exercise its *sua sponte* authority to reopen removal proceedings, "irrespective of whether that decision was proper ... the BIA's determination to forgo the exercise of its *sua sponte* authority is a decision that [courts] are without jurisdiction to review").

Those decisions remain the law of this circuit. "A published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'" *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)); *see also United States v. Barnwell*, 477 F.3d 844, 850 n. 4 (6th Cir. 2007) (citing *Meeks v. Illinois Cent. Gulf R.R.*, 738 F.2d 748, 751 (6th Cir. 1984)). The same injunction appears in Sixth Circuit Rule 206(c), which reads: "Reported panel opinions are binding on subsequent panels." *Kucana* cannot fairly be read as overruling those cases, since the Supreme Court specifically expressed "no opinion on whether federal courts may review [BIA refusals] to reopen removal proceedings *sua sponte*." 130 S. Ct. at 839 n. 18. Therefore, we are constrained to hold that we lack jurisdiction to review the BIA's denial of the petitioner's motion to reopen *sua sponte*.

However, we believe the Supreme Court's reasoning set out in *Kucana* undermines the continuing

validity of *Harchenko* and *Barry*, since both cases are based on the same premise rejected in *Kucana*. *Barry* adopts the holding from *Harchenko* without analysis or discussion. *Harchenko*, in turn, after citing cases from other circuits, relies heavily on the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). *Heckler* held that when *Congress* commits to an agency discretionary authority to perform an act without prescribing meaningful governing standards, that exercise of discretion is placed beyond judicial review by section 701(a)(2) of the Administrative Procedures Act (APA). *Id.* at 830, 105 S. Ct. 1649; *see* 5 U.S.C. § 701(a)(2) (authorizing judicial review of final agency action "except to the extent that ... agency action is committed to agency discretion by law"). It does not support a conclusion that an *agency* can strip a court of jurisdiction to review its own actions by enacting regulations that deem these actions discretionary. *Barry* and *Harchenko* may have misread *Heckler* by applying it to agency decisions made discretionary by regulation, that is, by the agency itself, effectively permitting the agency to insulate its own decisions from judicial review-a proposition soundly rejected by the Court in *Kucana*.

Heckler itself rejected a claim by several death row inmates who sought a mandatory injunction to compel the Food and Drug Administration to enforce provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, (FDCA) against officials in states that had adopted the lethal injection method for carrying out a death sentence. The inmates ar-

gued that the FDCA prohibited off-label use of drugs, and that the drugs chosen by the states could not be used for that purpose until the FDA approved the drugs as "safe and effective" for human execution. *Id.* at 827, 105 S. Ct. 2427. The Court held that the FDA's decision not to institute enforcement action was shielded from judicial review by section 701(a)(2) of the APA. In construing that section, the Court cited *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977), which characterized that statutory bar to judicial review as "a very narrow exception." *Overton Park,* 401 U.S. at 410, 91 S. Ct. 814. The *Overton Park* Court explained, "The legislative history of the Administrative Procedure Act indicates that [this exception] is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Ibid.* (citing S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The *Heckler* court stated that under section 702(a)(2), "review is not to be had if the *statute* is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the *statute* ('*law*') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Heckler,* 470 U.S. at 830, 105 S. Ct. 1649 (emphasis added). The Court concluded that "[t]he general exception to reviewability provided by § 701(a)(2) for action 'committed to agency discretion' remains a narrow one" and left "to *Congress,* and not to the courts, the decision as to whether an agency's refusal

to institute proceedings should be judicially reviewable." *Id.* at 838, 105 S. Ct. 1649 (emphasis added).

In *Heckler,* the Court determined that *Congress* can restrict the jurisdiction of federal courts over certain agency actions under the APA by deeming them "discretionary" and drafting "statutes" that provide a court "no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830, 105 S. Ct. 1649. It does not support a conclusion that an *agency* can strip a court of jurisdiction to review its own actions by enacting regulations that deem these actions discretionary. Recognizing such authority would fundamentally alter the constitutional checks and balances put in place by the separation of powers doctrine. *See Kontrick v. Ryan,* 540 U.S. 443, 452, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (holding that under the separation of powers doctrine, only Congress can expand or contract the subject-matter jurisdiction of a lower Article III court); *Keene Corp. v. United States,* 508 U.S. 200, 207, 113 S. Ct. 2035, 124 L. Ed. 2d 118 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts."); *INS v. Chadha,* 462 U.S. 919, 957-58, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (holding that Congress may alter federal court jurisdiction through legislation, but to do so it must satisfy the requirements of bicameralism and presentment).

Kucana reinforces *Heckler*'s prescription that the narrow exception to judicial review of agency decisions must originate from Congress, not the agency itself. The majority of cases finding no jurisdiction to

review denials of motions to reopen *sua sponte* on account of *Heckler,* including *Barry* and *Harchenko,* do so on the basis of standardless *regulations. See, e.g., Luis v. INS,* 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales,* 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft,* 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales,* 193 Fed. Appx. 245, 246 (4th Cir. 2006) (per curiam); *Enriquez-Alvarado v. Ashcroft,* 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko,* 379 F.3d at 410-11; *Pilch v. Ashcroft,* 353 F.3d 585, 586 (7th Cir. 2003); *Ekimian v. INS,* 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS,* 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno,* 188 F.3d 1273, 1279 (11th Cir. 1999). The only two cases that cite a statute in concluding that such decisions are unreviewable point to 8 U.S.C. § 1103(g)(2), which generally authorizes "[t]he Attorney General [to] establish such regulations ... as the Attorney General determines to be necessary for carrying out this section." *See Tamenut v. Mukasey,* 521 F.3d 1000, 1004 (8th Cir. 2008) (en banc) (per curiam) ("The regulation establishing the BIA's authority to reopen *sua sponte* was promulgated pursuant to a general grant of regulatory authority that sets no standards for this decision. *See* 8 U.S.C. § 1103(g)."); *Lenis v. U.S. Attorney Gen.,* 525 F.3d 1291, 1293 (11th Cir. 2008) ("[N]o statute expressly authorizes the BIA to reopen cases *sua sponte;* rather, the regulation at issue derives from a statute that grants general authority over immigration and nationalization matters to the Attorney General, and sets no standard for the Attorney General's decision-making in this context. *See* 8 U.S.C. § 1103(g)(2)."). Under

that rationale, however, *any* agency decision made under a regulation in which the agency grants itself discretion to act would be beyond judicial review where Congress granted general authority to the agency to make rules, which is to say, in virtually every case. That result directly contradicts *Kucana*'s central holding.

Moreover, the regulation at issue in *Kucana,* 8 C.F.R. § 1003.2, is the same one that the courts of appeals have held defines the BIA's discretion over *sua sponte* reopening so broadly as to preclude review. In deeming such decisions unreviewable, the courts have pointed to the breadth of the first paragraph of the regulation:

> (a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision.... The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

8 C.F.R. § 1003.2(a); *see, e.g., Harchenko,* 379 F.3d at 411 ("No language in the provision requires the BIA to reopen a deportation proceeding under any set of particular circumstances. Instead, the provision merely provides the BIA the discretion to reopen immigration proceedings as it sees fit.") (internal quotation marks and citation omitted). Yet the BIA's

authority to deny motions to reopen, as set out in the second sentence of the regulation, is no less broad. The second sentence states that the BIA's discretion regarding motions to reopen is "subject to the restrictions of this section," but the rest of the regulation imposes no limits on the BIA's authority to refuse such motions. Rather, it reads in relevant part:

> (c) Motion to reopen.
>
> (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. *A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subject to the hearing.*

8 C.F.R. § 1003.2(c) (emphasis added). As the Supreme Court has noted regarding materially identical language in 8 C.F.R. § 3.2, the predecessor to § 1003.2, the regulation "is couched solely in negative terms; it requires that under certain circumstances a motion to reopen be denied, but does not specify the conditions under which it shall be granted." *INS v. Doherty*, 502 U.S. 314, 323, 112 S. Ct. 719, 116 L. Ed. 2d 823 (1992). By consequence, the Court concluded, "[t]he granting of a motion to reopen is thus discretionary." *Id.* at 323, 112 S. Ct. 719. In other words, § 1003.2 no more fetters the BIA's discretion to deny motions to reopen than it does the BIA's discretion to reopen proceedings *sua sponte*. Nor does the statute pursuant to which this regulation is promulgated, 8 U.S.C. § 1103(g)(2) ("The Attorney General shall establish such regulations ... as the Attorney General determines to be necessary for carrying out this section."), provide any evident limit to the agency's authority. If courts nonetheless retain jurisdiction to review the BIA's discretionary decision not to grant a motion to reopen, it is difficult to understand how the BIA's equally broad discretion not to reopen proceedings *sua sponte* entirely bars judicial review.

Because *Barry* and *Harchenko* stand on the same tenuous foundation that an agency acting on its own can insulate its decisions from judicial review-a foundation to which *Heckler* lends no support and which has been undermined conclusively by *Kucana*-we believe those precedents ought to be reexamined by the *en banc* court.

Gor's case provides a clear example of why review of BIA decisions is necessary. The IJ who conducted Gor's hearing violated BIA regulations by neglecting to provide Gor with a list of free legal service-providers or confirm that Gor had received this list. *See* 8 C.F.R. § 1240.10(a). "It is an elemental principle of administrative law that agencies are bound to follow their own regulations." *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004). Moreover, "[w]here a prescribed procedure is intended to protect the interests of a party before the agency, 'even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.'" *Id.* (quoting *Vitarelli v. Seaton*, 359 U.S. 535, 547, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959) (Frankfurter, J., concurring)). Here, the IJ's failure to abide by the agency's own regulations, insofar as it impeded Gor's ability to retain counsel, likely violated Gor's right to due process. *Cf. Picca v. Mukasey*, 512 F.3d 75, 78-80 (2d Cir. 2008) (vacating removal order where IJ failed to comply with 8 C.F.R. § 1240.10(a)(3) because petitioner's access to counsel in immigration proceedings implicates the "'fundamental notions of fair play underlying the concept of due process'") (quoting *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991)); *Snajder v. INS*, 29 F.3d 1203, 1206-07 (7th Cir. 1994) (vacating removal order where IJ violated petitioner's right to counsel by failing to obey BIA regulation requiring re-apprisal of the petitioner's rights following lodging of an additional charge). Had Gor been represented during his hearing, counsel might well have presented the co-

lorable legal arguments, now raised before us, that Gor's convictions for failure to pay child support do not render him subject to deportation under the INA. In other words, but for the IJ's apparent due process violation, there is a strong possibility that Gor could have demonstrated his deportation is contrary to law.

In this case, the petitioner's motion to reopen also was based in part on the claim that the IJ failed to develop the record sufficiently to establish that the petitioner's convictions made him removable under 8 U.S.C. § 1227(a)(2)(E)(i). That claim deserves some consideration. Normally, courts use a categorical approach when interpreting a state criminal statute, focusing on the " 'intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation'." *Patel v. Ashcroft*, 401 F.3d 400, 409 (6th Cir. 2005) (quoting *Chery v. Ashcroft*, 347 F.3d 404, 407 (2d Cir. 2003)). Under that approach, courts look at the " 'elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime.' " *Ibid.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 6-7, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)); *see also Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). Where the statute punishes diverse categories of criminal acts, some of which would subject an alien to removal and some of which would not, courts and the agency apply the so-called "modified categorical approach" to analyzing an alien's conduct. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005); *Mehboob v. Attorney Gen.*, 549 F.3d 272, 275 (3d Cir. 2008); *James v. Mukasey*, 522 F.3d

250, 254-55 (2d Cir. 2008); *Jaadan v. Gonzales*, 211 Fed. Appx. 422, 427 (6th Cir. 2006). If the statute is considered divisible, the agency can refer to the record underlying the conviction-the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy, but not the underlying facts-to ascertain whether the alien's conviction falls within the part of the statute that permits removal. *James*, 522 F.3d at 254 (citing *Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2d Cir. 2003)); *Jaadan*, 211 Fed. Appx. at 427. " '[T]he disjunctive phrasing of the statute of conviction will ... invite inquiry into the specifics of the conviction.' " *Mendieta-Robles v. Gonzales*, 226 Fed. Appx. 564, 567 (6th Cir. 2007) (quoting *Singh v. Ashcroft*, 383 F.3d 144, 148 (3d Cir. 2004)).

Although the statute under which the petitioner was found to be removable sets forth a clear definition for the term "domestic violence," Congress has not defined the terms "child abuse," "child neglect" or "child abandonment" in the Immigration and Nationality Act. And although the BIA often considers child support arrearage as a negative factor in the exercise of its discretion, *see, e.g., In re Vicheth Sek a.k.a. Vicheth Ricky Sek*, 2004 WL 1739102 (BIA June 8, 2004), it has never held that a failure to pay child support qualifies as a removable offense on its own. Nor has any court of appeals held so. Recognizing that section 237(a)(2)(E)(i) was enacted in the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 2009 (1996) ("IIRIRA"), "as part of an aggressive legislative

movement to expand the criminal grounds of deportability in general and to create a 'comprehensive statutory scheme to cover crimes against children' in particular," the BIA has defined "child abuse" broadly as "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation." *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 508-09, 517 (BIA 2008). The House conference report on the IIRIRA notes that the grounds for deportability were amended

> to provide that an alien convicted of crimes of domestic violence, stalking, or child abuse is deportable. The crimes of rape and sexual abuse of a minor are elsewhere classified as aggravated felonies ..., thus making aliens convicted of those crimes deportable and ineligible for most forms of immigration benefits or relief from deportation.

H.R. Conf. Rep. No. 104-828, 104th Cong., 2d Sess. at 505-06 (Sept. 24, 1996); *see In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 994-95 (BIA 1999). "Congress'[s] intent, then, was to expand the definition of an aggravated felony and to provide a comprehensive statutory scheme to cover crimes against children." *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994. It is doubtful, however, that the definition is broad enough to include the crime of failing to pay child support, which would expand signifi-

cantly the grounds for removal.

The BIA denied the motion to reopen, determining that the question whether the petitioner actually committed a removable offense was not worthy of consideration because it did not view the issue as "an exceptional situation." App'x at 9. That conclusion is difficult to accept. The motion to reopen raised a basic question whether the petitioner had committed an offense that provides a legal basis for removal; removal of a lawful permanent resident absent a statutory basis plainly would amount to an exceptional circumstance.

III.

Gor's case is a textbook example of the propriety-and the necessity-of judicial review of agency decisions. *See Bowen v. Massachusetts*, 487 U.S. 879, 908 n. 46, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988) ("Much recent academic writing emphasizes the importance of ... Court review of agency action. The theoretical justification for judicial review of agency action is grounded in concerns about constraining the exercise of discretionary power by administrative agencies. That power is legitimized by the technical expertise of agencies. But judicial review promotes fidelity to statutory requirements, and, when congressional intent is ambiguous, it increases the likelihood that the regulatory process will be a responsible exercise of discretion.") (quoting *Delaware Div. of Health & Soc. Servs. v. Dept. of Health & Human Servs.*, 665 F. Supp. 1104, 1117-18 (D. Del. 1987)). Although circuit precedent bars that review, there is

good reason here to reexamine our cases on the subject.

However, for the reasons stated, we GRANT the government's motion to dismiss the petition for review for want of jurisdiction.

ALICE M. BATCHELDER, Chief Judge, concurring.

I concur with the lead opinion's conclusion that we do not have jurisdiction to review either the original decision of the Board of Immigration Appeals or their decision not to reopen proceedings *sua sponte*, and that Petitioner's appeal must be dismissed. I write separately to contest the notion set forth in the lead opinion that "the Supreme Court's recent decision in *Kucana v. Holder*, --- U.S. ----, 130 S. Ct. 827, --- L. Ed. 2d ---- (2010), casts considerable doubt on our circuit precedent that dictates" that we have no jurisdiction to review the BIA's denial of Tushar Gor's motion to reopen *sua sponte*.

The attempts of the lead opinion to make this case look like *Kucana* are creative but, ultimately, unconvincing. This case is fundamentally different from *Kucana* for two vitally important and, in my opinion, obvious reasons.

First, unlike the relevant arguments in *Kucana*-and unlike the lead opinion's characterization of the government's arguments here-the government here does not base its jurisdictional arguments on the text of 8 U.S.C. § 1252(a)(2)(B)(ii), which the lead

opinion concedes was the basis for the *Kucana* decision. Lead Op. at 186-87. Instead, the government argues only that "[t]his Court lacks jurisdiction to review the Board's refusal to *sua sponte* reopen because such determinations are committed to the Board's unfettered discretion." While the government made a nod to the jurisdiction-stripping provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Lead Op. at 187, the government's analysis relies entirely on our relevant case law, *Barry v. Mukasey*, 524 F.3d 721, 723 (6th Cir. 2008) ("the decision whether to invoke *sua sponte* authority under 8 C.F.R. § 1003.2(a) is committed to the unfettered discretion of the BIA and is therefore not subject to judicial review.") (internal quotation marks and brackets omitted), and *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004) ("The decision whether to invoke *sua sponte* authority is committed to the unfettered discretion of the BIA. Therefore, the very nature of the claim renders it not subject to judicial review.") (internal citation and quotation marks omitted). In fact, nowhere in the government's brief is § 1252 even mentioned.

Briefing in this case was completed prior to the Supreme Court's decision in *Kucana*, and we had previously held that § 1252(a)(2)(B)(ii) proscribed judicial review of BIA denials of motions to reopen. *Ghazali v. Holder*, 585 F.3d 289, 291 (6th Cir. 2009) ("The Immigration and Nationality Act strips federal courts of jurisdiction to review decisions specified under 8 U.S.C. §§ 1151-1381 to be in the discretion of the Attorney General.") (internal quotation marks

and brackets omitted). The government could have attempted to argue that § 1252 and *Ghazali* precluded review, but did not. It is therefore troubling that the lead opinion chooses to mischaracterize the government's arguments. Doing so allows the lead opinion to create the illusion that this case is analogous to *Kucana*.

The second reason why this case differs from *Kucana* is the fact that there is a world of difference between the immigrant's *statutory* right to file a motion to reopen, which was at issue in *Kucana*, and the discretionary right of the BIA-a right neither granted by nor addressed by Congress-to reopen *sua sponte*. The *Kucana* Court recognized this difference when it expressly declined to express any opinion "on whether federal courts may review the Board's decision not to reopen removal proceedings *sua sponte*." *Kucana*, 130 S. Ct. at 839 n. 18. The lead opinion goes to great lengths to show why the Supreme Court's express refusal to opine on the issue decided by our prior holdings in *Barry* and *Harchenko* should be viewed as an indication that the time has come to abandon those holdings. In doing so, the lead opinion ignores the huge gulf that separates a statutory *right* to move to reopen and a purely discretionary non-statutory *power* to reopen *sua sponte*.

The *Kucana* Court held that the text of § 1252 barred judicial review "only when Congress itself set out the Attorney General's discretionary authority in the statute." *Id.* at 837 n.13. Any attempts to proscribe judicial review by regulation only, including 8

C.F.R. § 1003.2(a), were invalid. "Had Congress elected to insulate denials of motions to reopen from judicial review, it could have so specified." *Kucana*, 130 S. Ct. at 838. The lead opinion here clearly interprets this language to mean that all BIA decisions must be subject to judicial review, except where Congress has expressly removed jurisdiction. When the power to reopen *sua sponte* is viewed in context, however, this conclusion is completely unsupportable.

The *Kucana* Court was faced with: (1) an express statutory right to file a motion to reopen proceedings; and (2) agency action that attempted to declare BIA responses to an immigrant's exercise of that right off-limits to judicial review. The Court described the motion to reopen as "an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Id.* at 834 (quoting *Dada v. Mukasey*, 554 U.S. 1, 128 S. Ct. 2307, 2317-19, 171 L. Ed. 2d 178 (2008)). This safeguard had been put in place by Congress, *id.* at 838, and only an express removal of jurisdiction would suffice. Any ambiguity was to be resolved in favor of judicial review because the cannons of *statutory* construction establish a presumption of judicial review of administrative action. *Id.* at 839. None of the *Kucana* Court's analysis applies, however, to the case before us.

The power of the BIA to reopen *sua sponte* arises only from its own regulations. Congress has taken no steps to establish an individual right applicable to Gor, and without Congressional action to establish a right, the firm requirement that only Congress may

remove jurisdiction simply does not exist. No one has argued that the BIA was required to give itself the power to reopen proceedings *sua sponte* in the event it should decide that extraordinary circumstances warrant it, but the lead opinion concludes that once an agency determines that it will, on occasion, bend the rules in helpful ways, every person who might benefit from a bending of the rules has the right to challenge the agency's decision not to do so.[1]

Harchenko and *Barry* remain good law because they were premised on the well-established principle that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Harchenko*, 379 F.3d at 411 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985)). As we stated in *Harchenko*:

> As other courts have noted, the discretion permitted by [8 C.F.R. § 1003.2(a)] is "so wide that even if the party moving has made out a prima facie case for relief", the BIA can deny a motion to reopen a deportation order. No language in the provision requires the BIA to reopen a deportation proceeding under any set of particular circumstances. Instead, the provision merely provides the BIA the discretion to reopen immigration proceedings as it sees fit.

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[1] From a policy perspective, the lead opinion seems perfectly designed to assure that agencies will never again be willing to bend the rules in order to help those they are empowered to help.

Id. (citation omitted). The *Harchenko* and *Barry* panels concluded, as has nearly every other Circuit to consider the question, that the BIA's exercise of its *sua sponte* authority was not reviewable because there was simply "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). As expressed in greater detail by the Eighth Circuit:

> The statute governing motions to reopen speaks only to motions filed by a party; it does not establish any standard to guide the agency's discretion whether to reopen on its own motion. The regulation establishing the BIA's authority to reopen *sua sponte* was promulgated pursuant to a general grant of regulatory authority that sets no standards for this decision. The regulation itself, 8 C.F.R. § 1003.2(a), provides no guidance as to the BIA's appropriate course of action, sets forth no factors for the BIA to consider in deciding whether to reopen *sua sponte,* places no constraints on the BIA's discretion, and specifies no standards for a court to use to cabin the BIA's discretion.

Tamenut v. Mukasey, 521 F.3d 1000, 1004 (8th Cir. 2008) (internal citations omitted). Without a meaningful standard to apply, review of the BIA's exercise of its discretion would become nothing more than a vehicle for obtaining judge-preferred results.

Because I believe this case differs fundamentally from *Kucana,* I believe that our prior holdings in *Barry* and *Harchenko* remain good law, and I cannot join the lead opinion in urging their abandonment.

COLE, Circuit Judge, concurring in part and concurring in the judgment.

I agree that we lack jurisdiction to review the original decision of the Board of Immigration Appeals ("BIA") and that this court's precedent blocks review of the BIA's decision not to reopen *sua sponte* Gor's immigration proceedings. I write separately to explain why I believe *Kucana v. Holder,* --- U.S. ----, 130 S. Ct. 827, --- L. Ed. 2d ---- (2010), indicates that this precedent is in error.

The Government conflates two potential jurisdictional obstacles to appellate review: the jurisdictional bar enacted by § 1252(a)(2)(B)(ii) and the purported absence of meaningful standards against which to evaluate BIA decisions not to reopen proceedings *sua sponte.* In its brief, the Government argues that the statutory bar encompasses BIA decisions not to reopen immigration proceedings *sua sponte,* citing in support our decisions in *Barry v. Mukasey,* 524 F.3d 721 (6th Cir. 2008), and *Harchenko v. I.N.S.,* 379 F.3d 405 (6th Cir. 2004). These decisions do not rely on § 1252(a)(2)(B)(ii), but rather hold that we lack jurisdiction because the regulation authorizing *sua sponte* reopening, 8 C.F.R. § 1003.2, "provides no standard against which to judge the agency's exercise of dis-

cretion." *See Harchenko,* 379 F.3d at 410-11. This holding, which rests on principles of administrative law, is distinct from the jurisdictional bar in § 1252(a)(2)(B)(ii).[1]

While the Supreme Court in *Kucana* expressly addressed only whether § 1252(a)(2)(B)(ii) bars appellate review of BIA decisions to deny timely motions to reopen and disclaimed expressing any opinion on whether the courts may review BIA decisions not to reopen removal proceedings *sua sponte, see Kucana,* 130 S. Ct. at 839 n.18, the Court's rationale nonetheless suggests that neither § 1252(a)(2)(B)(ii) nor any dearth of meaningful standards of review precludes our consideration of such decisions. *Kucana*

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[1]Chief Judge Batchelder's concurring opinion dismisses the view that the Government relies on both § 1252(a)(2)(B)(ii) and our precedent as a troubling and deliberate mischaracterization of the Government's argument. The opinion argues that the Government does not rely on § 1252(a)(2)(B)(ii) nor mention *Ghazali v. Holder,* 585 F 3d 289 (6th Cir 2009), which it interprets as holding that § 1252(a)(2)(B)(ii) proscribes judicial review of BIA denials of timely motions to reopen. In fact, the first sentence of the Government's substantive analysis explicitly addresses § 1252(a)(2)(B)(ii), (*see* Resp't Br. 12), and the remainder of the Government's argument follows from this starting point. Moreover, it comes as no surprise that the Government does not mention *Ghazali,* as the decision does not concern a motion to reopen, but a motion to reconsider, and does not hold that we lack jurisdiction over either *See* 585 F 3d at 291. Thus, while little rests on the point-both the lead opinion and this opinion acknowledge that *Kucana* explicitly addresses only § 1252(a)(2)(B)(ii)-to say that the Government relies on both § 1252(a)(2)(B)(ii) and our precedent seems an entirely accurate characterization.

held that § 1252(a)(2)(B) bars review only of decisions made discretionary by the Immigration and Nationality Act ("INA") itself, and not of decisions made discretionary by regulations promulgated pursuant to the INA.[2] As we and our sister courts have recognized, the BIA's authority to reopen proceedings *sua sponte* is made discretionary by regulation. *See Harchenko,* 379 F.3d at 410-11; *see also Mosere v. Mukasey,* 552 F.3d 397, 400-01 (4th Cir. 2009) (collecting cases from other circuits). Thus, under *Kucana*, § 1252(a)(2)(B)(ii) does not bar judicial review of such decisions. *See* 130 S. Ct. at 831. Finding otherwise would ignore the strong presumption in favor of judicial review and raise significant separation of powers concerns. *Cf. id.* at 839-40.[3]

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[2] The Court noted that "any lingering doubt" regarding this reading of § 1252(a)(2)(B)(ii) was dispelled by "the presumption favoring judicial review of administrative action" absent "clear and convincing evidence" to the contrary. *Kucana,* 130 S. Ct. at 839 (internal quotation marks omitted) While *Kucana* does not hold that Congress may never delegate legislative authority to curtail judicial review to an executive agency, any such delegation would raise significant separation of powers concerns. *Compare United States v. Dryden,* 563 F 3d 1168, 1170-71 (10th Cir. 2009) *and Owens v. Republic of Sudan,* 531 F 3d 884, 888-93 (D.C. Cir 2008) *with Miller v. F.C.C.,* 66 F.3d 1140, 1144 (11th Cir. 1995) *and United States v. Mitchell,* 18 F 3d 1355, 1360 n 7 (7th Cir 1994)

[3] While two Courts of Appeals have noted that 8 C.F.R § 1003 2(a) is promulgated pursuant to 8 U S C. § 1103, *see Lenis v U.S. Attorney Gen.,* 525 F.3d 1291, 1293 (11th Cir. 2008); *Tamenut v. Mukasey,* 521 F 3d 1000, 1004 (8th Cir. 2008), *Kucana* indicates that this general grant of regulatory authority does not block judicial review The BIA's authority over timely motions to reopen, which courts retain jurisdiction to review under *Kucana,* derives from the same statute In fact, § 1103 is

Moreover, the outcome of *Kucana* casts implicit but considerable doubt on the continued validity of *Barry* and *Harchenko*. As the lead opinion recognizes, the regulation at issue in *Kucana*, 8 C.F.R. § 1003.2, is the same one that we and other circuits have held defines the BIA's discretion over *sua sponte* reopening so broadly as to preclude review. Yet *Kucana* held-the BIA's equally unfettered discretion to deny motions to reopen notwithstanding-that the appellate courts retain jurisdiction to review such decisions, without any suggestion that their review might be impeded by a dearth of meaningful standards to apply.[4] Indeed, we and our sister courts routinely review BIA decisions denying motions to reopen without encountering any obstacle created by a lack of meaningful standards of review. We have held that the BIA abuses its discretion to deny motions to reopen when it acts arbitrarily, irrationally or contrary to law. *Lindor v. Holder*, 317 Fed. Appx. 492, 497 (6th Cir. 2009) (citing *Sswajje v. Ashcroft*, 350 F.3d 528,

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in a different subchapter of the INA to that specified by § 1252(a)(2)(B)(ii). *See Kucana*, 130 S. Ct. at 840-41 (Alito, J., concurring).

[4] The Ninth Circuit has pointed to the limitations on motions to reopen in 8 U.S.C. § 1229a(c)(7) as further constraining the BIA's discretion. *See Ekimian v. I.N.S.*, 303 F.3d 1153, 1157 (9th Cir. 2002). *Kucana* made clear, however, that "[s]ection 1229a(c)(7) ... is not directed to the agency's discretion to grant or deny motions to reopen. In the main, it simply lays out the requirements *an alien* must fulfill when filing a motion to reopen." 130 S. Ct. at 833 n.6 (internal quotation marks omitted). The same is true of the regulatory provisions implementing § 1229a(c)(7) in 8 C.F.R. § 1003.2(c)(2)-(3).

532 (6th Cir. 2003)). To ensure that the BIA has exercised its discretion appropriately, we require that it give more than cursory, summary, or conclusory statements in support of its decision. *Id.* at 498 (citing *Daneshvar v. Ashcroft*, 355 F.3d 615, 626 (6th Cir. 2004)). The BIA must provide a rational basis for its decision, including an explanation of any departure from established policies, and the decision may not rest on an impermissible basis, such as invidious discrimination against a particular race or group. *Id.* (citing *Allabani v. Gonzales*, 402 F.3d 668, 675 (6th Cir. 2005)). Similar standards might be readily and meaningfully applied in reviewing refusals to reopen proceedings *sua sponte*. *Cf. Tamenut*, 521 F.3d at 1006-07 (Beam, J., dissenting) (making similar argument).

This is not to say that the standard and scope of review we apply should be the same as when reviewing the BIA's denial of a timely motion to reopen. Under 8 U.S.C. § 1229a(c)(7)(C)(i), petitioners generally have ninety days from the entry of a removal order to move for reopening; after this deadline has expired, the only avenue of relief is for the BIA to reopen proceedings *sua sponte*. Applying the same level of scrutiny when the ninety days has elapsed as when a timely motion has been filed would tend to undercut the statutory deadline. Our review must reflect that the BIA has broad discretion in this area and appropriately may set a higher bar to reopen proceedings *sua sponte* than following a timely motion. *Cf. Kucana*, 130 S. Ct. at 838 (noting that BIA decisions must be accorded "due respect"). Even so,

the BIA cannot exercise its authority arbitrarily, irrationally, or in a manner that is contrary to law or the Constitution.[5]

In this case, the BIA's decision declining to reopen proceedings did not address the extraordinary circumstances of Tushar Gor's hearing, instead stating only that the claims Gor raises could have been presented on appeal. Thus, on the strength of a single sentence, Gor is now to be deported from the United States-the country in which he has lived since the age of four-to India-a country that he has visited three times for a total period of less than three months-despite the IJ's apparent violation of his due process rights and the colorable legal arguments that his deportation is contrary to law. Yet we are barred from even considering whether the BIA's cursory dismissal of Gor's claims was adequate in light of these circumstances and the reasonable possibility that Gor's ability to retain counsel and present his

---

[5] Indeed, several of our sister courts have suggested-even while employing language as sweeping as that in *Barry* and *Harchenko*-that they retain jurisdiction to review constitutional challenges to BIA refusals to reopen proceedings *sua sponte*. *See Tamenut*, 521 F.3d at 1005 ("Although this court lacks jurisdiction over Tamenut's challenge to the BIA's decision not to reopen *sua sponte*, we generally do have jurisdiction over any colorable constitutional claim."); *see also Nawaz v. Holder*, 314 Fed. Appx. 736, 736 (5th Cir. 2009) ("While we do not have jurisdiction to consider Nawaz's non-constitutional challenges to the BIA's refusal to reopen his removal proceedings *sua sponte*, we retain jurisdiction to consider constitutional challenges that were raised before the BIA."); *Lenis*, 525 F.3d at 1294 (noting that "an appellate court may have jurisdiction over constitutional claims related to the BIA's decision not to exercise its *sua sponte* power").

arguments on appeal also was impeded by the IJ's failure to provide a list of free legal-service providers. Given *Kucana's* implicit recognition that meaningful standards of review exist against which to evaluate BIA decisions made pursuant to 8 C.F.R. § 1003.2, I can see no good reason why we should not be able to assess whether the BIA appropriately exercised its authority here. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (noting that bar to judicial review of agency action where there are no standards to apply is "a very narrow exception" applicable only in "rare instances").

Our sister courts have recognized that, following the Attorney General's 2002 streamlining reforms-which cut the number of BIA members from twenty-three to eleven and allowed single-member review of most appeals-board members must review an enormous number of deportation cases, resulting in errors of disturbing magnitude and frequency. *See, e.g., Kadia v. Gonzales*, 501 F.3d 817, 820-21 (7th Cir. 2007) (noting that one board member admitted to reviewing more than fifty cases in one day and arguing that "[r]epeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate"); *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (collecting cases from the Second, Third, Seventh and Ninth Circuits where BIA adjudication

"has fallen below the minimum standards of legal justice"): *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) (reversing a decision that "was an embarrassment to the Agency on multiple levels" and noting that while the 2002 reforms may "save an overburdened BIA from unnecessary and redundant tasks," they are not "a license for the BIA to say 'not our problem'"). Particularly in light of the present state of affairs at the BIA, we should not so easily and unnecessarily relinquish our critical role in ensuring that the agency properly exercises its awesome authority over deportation.

Appendix B

U.S. Department of Justice — Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A38 963 247 – Orient, OH Date: June 11, 2008

In re: TUSHAR PRAVINKUMAR GOR

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Philip Eichorn, Esquire

ORDER:

PER CURIAM. The respondent, who is from India, filed a motion to reopen on May 20, 2008. The Board dismissed the respondent's appeal on October 5, 2007, so the motion was filed late. *See* 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (the "DHS") has not responded to the motion, which will be denied.

The respondent was found subject to removal under 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. §1227(a)(2)(E)(i), based on being convicted of "a crime of child abuse, child neglect, or child abandonment", due to convictions in Ohio for non-support. An Immigration Judge denied the res-

pondent cancellation of removal under section 240A(a) of the Act. At the removal hearings, the Immigration Judge informed the respondent of his right to be represented by counsel at no expense to the government, Tr. at 1, told the respondent that low or no-cost representation might be available, and continued the case twice for the respondent to find counsel (Tr. at 1-2, 4). The case was continued again for the respondent to file an asylum application, or to obtain counsel (Tr. at 8).

The respondent in the motion claims that the Immigration Judge did not provide him with a list of available free legal services, required him to proceed without counsel after 2 continuances were granted for the respondent to find a lawyer, and failed to "fully develop the record" to determine if the respondent was subject to removal or eligible for relief from removal.

The Board could only reopen proceedings under its *sua sponte* authority at 8 C.F.R. §1003.2(a). This action is taken only in "exceptional situations." *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); *see also Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008) (acknowledging that Board's authority to reopen *sua sponte* is within its unfettered discretion). This is not such an exceptional situation. All of the claims raised by the respondent in the motion could have been presented to the Board on appeal. The "recent case law" cited by the respondent arises outside of the Sixth Circuit Court of Appeals, whose case law applies to this ap-

peal, and is either, in any event, unpublished or not directly relevant to the respondent's case. The untimely motion is, therefore, denied, and the request for a stay is denied as moot.

/s/

FOR THE BOARD

Appendix C

No. 08-3859

United States Court of Appeals
For the Sixth Circuit

Filed October 5, 2010
Leonard Green, Clerk

Tushar Pravinkumar GOR, Petitioner,	)	
v.	)	ORDER
Eric H. HOLDER, Jr., Attorney General, Respondent.	)	

BEFORE: BATCHELDER, Chief Judge; COLE, Circuit Judge; and LAWSON*, District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on

* Hon. David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

Leonard Green, Clerk

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 5 Section 701(a) of the United States Code provides in relevant part:

(a) This chapter applies, according to the provisions thereof, except to the extent that--

> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

Title 8 Section 1252 of the United States Code provides in relevant part:

(a) Applicable provisions

> (1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2)

* * * *

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any

other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

* * * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or

any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Title 8 Section 1227 of the United States Code provides in relevant part:

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * *

(2) Criminal offenses

* * * *

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and [sic]

(i) Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former

> spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

Title 8 Section 1003.2(a) of the Code of Federal Regulations provides in relevant part:

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

Title Section 1240.10 of the Code of Federal Regulations provides in relevant part:

(a) Opening. In a removal proceeding, the immigration judge shall:

(1) Advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice authorized to practice in the proceedings and require the respondent to state then and there whether he or she desires representation;

(2) Advise the respondent of the availability of free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized pursuant to § 1292.2 of this chapter, located in the district where the removal hearing is being held; [and]

(3) Ascertain that the respondent has received a list of such programs, and a copy of appeal rights[.]

Section 2919.21(B) of the Ohio Revised Code provides:

No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support.